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Nos. 03-147 and 03-431

In the Supreme Court of the United States

PRODUCER COALITION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

SHELL OFFSHORE INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (FERC) reasonably concluded that portions of Transco's pipeline system located on the Outer Continental Shelf involve the gathering of natural gas within the meaning of Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b).

2. Whether FERC was required to treat the reclassification of portions of Transco's system as nonjurisdictional as abandonment of jurisdictional facilities under Section 7(b) of the NGA, 15 U.S.C. 717f(b), and therefore to determine whether the action would further the public interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 331 F.3d 1011. The orders of the Federal Energy Regulatory Commission are reported at 96

[1] References to the Pet. App. are to the appendix to the petition for a writ of certiorari in No. 03-431.

F.E.R.C. ¶ 61,118 (Pet. App. 60a-97a), 97 F.E.R.C. ¶ 61,300 (Pet. App. 98a-126a), 96 F.E.R.C. ¶ 61,115 (Pet. App. 127a-167a), 97 F.E.R.C. ¶ 61,296 (Pet. App. 168a-197a), 96 F.E.R.C. ¶ 61,246 (Pet. App. 198a-234a), and 97 F.E.R.C. ¶ 61,298 (Pet. App. 235a-263a).

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2003. A petition for rehearing was denied on August 22, 2003. The petition for a writ of certiorari in No. 03-147 was filed on July 25, 2003, and in No. 03-431 on September 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, confers on the Federal Energy Regulatory Commission (FERC) jurisdiction to regulate certain aspects of the natural gas industry. The provisions of the NGA apply to "the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to," *inter alia*, "the production or gathering of natural gas." 15 U.S.C. 717(b).

The NGA gives FERC the authority to ensure that rates and charges for sales and transportation subject to its jurisdiction are "just and reasonable," and to declare as unlawful any "unjust, unreasonable, unduly discriminatory, or preferential" rate or charge for or "in connection with" any "transportation or sale of natural gas" subject to its jurisdiction. 15 U.S.C. 717c(a), 717d(a). The Act also requires that any natural gas company obtain a "certificate of public convenience and necessity" before constructing or operating new facili-

ties, 15 U.S.C. 717f(c), and further bars any natural gas company from "abandon[ing] all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that the present or future public convenience or necessity permit such abandonment," 15 U.S.C. 717f(b).

2. This case involves FERC's reclassification of portions of a pipeline's system operating on the Outer Continental Shelf (OCS) as non-jurisdictional gathering facilities within the meaning of 15 U.S.C. 717(b) and FERC's determination that 15 U.S.C. 717f(b) did not preclude the pipeline from transferring those facilities to its non-jurisdictional gathering affiliate.

Although the NGA does not define the term "gathering," this Court has stated that the terms "production and gathering" under the NGA are "narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 90 (1963). Consistent with that principle, FERC has long defined the term gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line." *Barnes Transp. Co.*, 18 F.P.C. 369, 372 (1957).

To differentiate jurisdictional transportation and non-jurisdictional gathering for pipelines, FERC for many years has employed two principal tests. Under the "behind-the-plant" test, facilities upstream of compressors and processing plants (*i.e.*, toward the wellhead where the gas comes out of the ground) were presumptively gathering facilities, while facilities downstream of the plants (*i.e.*, toward the consumer) were presumptively transportation facilities. For gas that

requires no processing, FERC has also employed a "central-point-in-the–field" test, under which lateral lines that collect and transport gas from separate wells and that then converge into a single large line were classified as gathering facilities, while facilities downstream of the collection point in a field were classified as transportation. Since 1983, FERC has subsumed those two tests into a "primary function" test that focuses on a number of physical factors (*e.g.*, length, diameter, and configuration of a pipeline) and certain other criteria, to determine whether facilities are primarily devoted to gathering or transportation. Under that test, no one factor is determinative, nor do all factors apply in every situation. Pet. App. 3a-4a; *ExxonMobil Gas Mktg. Co.* v. *FERC*, 297 F.3d 1071, 1077 (D.C. Cir. 2002), cert. denied, 124 S. Ct. 48 (2003); *Sea Robin Pipeline Co.* v. *FERC*, 127 F.3d 365, 368-369 (5th Cir. 1997).

FERC developed its primary function test in the context of onshore gathering patterns. For natural gas produced on the Outer Continental Shelf (OCS), pipelines generally are configured differently. "[P]ipelines on the OCS typically do not gather gas at a local, centralized point within a field as they would onshore, to prepare it for traditional transportation." *ExxonMobil Gas Mktg. Co.*, 297 F.3d at 1077. "Rather, on the OCS, relatively long lines are constructed to carry the raw gas from offshore platforms, where 'only the most rudimentary separation and dehydration operations' are conducted, to the shore or a point closer to shore, where it can be processed into 'pipeline quality' gas." *Id.* at 1077-1078 (quoting *EP Operating Co.* v. *FERC*, 876 F.2d 46, 47-48 (5th Cir. 1989)); accord *Sea Robin Pipeline*, 127 F.3d at 369-370 (noting that pipelines on the OCS "must construct large pipes to carry (often

over a hundred miles away) the raw gas from offshore rigs to the shore for processing"). In response to the practical and physical differences between onshore and offshore pipeline configurations, FERC modified its primary function test for the OCS to allow for the increasing length and diameter of OCS gathering lines, *Amerada Hess Corp.*, 52 F.E.R.C. ¶ 61,268, at 61,988 (1990), and later announced that it would "presume facilities located in deep water [over 200 feet] are primarily engaged in gathering or production." *Gas Pipeline Facilities & Servs. on the Outer Continental Shelf—Issues Related to the Comm'n's Jurisdiction Under the Natural Gas Act and Outer Continental Shelf Lands Act*, 74 F.E.R.C. ¶ 61,222, at 61,759 (1996).

As a result of FERC's decision in Order 636[2] to promote competition by requiring pipelines to "unbundle" their previously bundled sales and transportation into separate services and to transport natural gas for all qualified shippers, *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1125-1127 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997), some such pipelines have sought to shed OCS facilities that primarily perform a gathering function. Accordingly, those pipelines have asked FERC to reclassify OCS facilities that were previously classified as transportation, and to authorize "spin-downs" of OCS gathering facilities to affiliates.

Even when granting such requests, FERC retains NGA rate jurisdiction over those reclassified facilities

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[2] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 3 F.E.R.C. Stats. & Regs. (CCH) ¶ 30,939 (Apr. 8, 1992).

that the pipeline retains. FERC "may regulate rates charged for transportation on the pipeline's own gathering facilities performed in connection with jurisdictional transportation." *Northern Natural Gas Co.* v. *FERC*, 929 F.2d 1261, 1263 (8th Cir.) (emphasis omitted), cert. denied, 502 U.S. 856 (1991). Moreover, in spin-down situations, where the pipeline and its nonjurisdictional gathering affiliate act in concert to frustrate FERC's rate regulation, FERC has disregarded corporate forms, treated the two affiliates as a single entity, and regulated the rates for gathering as rates charged "in connection with" the pipeline's transportation rates. *Shell Offshore Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 100 F.E.R.C. ¶ 61,254 (2002), appeal pending *sub nom. Williams Gas Processing–Gulf Coast Co.* v. *F.E.R.C.*, No. 03-1179 (D.C. Cir. docketed June 27, 2003).

3. The instant case involves the reclassification to gathering and request to spin-down all or parts of four OCS subsystems originally owned and operated by Transcontinental Gas Pipe Line Corporation (Transco) as jurisdictional transportation facilities. Three of those subsystems, North Padre Island, Central Texas and North High Island, which range in length from 23 to 270 miles of pipeline (Pet. App. 87a, 133a-134a), are each configured roughly in the form of a "Y," with legs that converge from OCS production areas into a central point of interconnection with a trunk or trunks that run to shore. *Id.* at 87a-88a, 158a-160a.[3] Facilities located on the legs collect gas from wells located along their length and deliver it to the central point. *Id.* at 87a-88a, 157a-160a. From there, trunklines carry the gas north

[3] The trunks are not part of the North Padre Island or Central Texas subsystems. Pet. App. 157a-160a.

to onshore processing plants for delivery to Transco's mainline transportation system. *Id.* at 88a, 133a-134a.

The fourth subsystem, Central Louisiana, includes approximately 200 miles of offshore pipeline, Pet. App. 203a, 225a, arrayed in a "spine and lateral" configuration. The trunklines (the "spine") extend 42 miles from shore to Vermillion Block 67 on the OCS; laterals reach out to OCS production areas from the trunklines and from Vermillion Block 67. *Id.* at 225a-226a. The laterals deliver gas from wells located along their length to the trunklines, which in turn, transport the gas to Transco's processing plant on Cow Island, just off the coast of Louisiana. *Id.* at 226a.

In March 2001, Transco submitted an application pursuant to 15 U.S.C. 717f(b), seeking permission to abandon the four subsystems and transfer them to Transco's affiliate, Williams Gas Processing—Gulf Coast Company (Williams). Williams, in turn, petitioned for declaratory orders reclassifying the subsystems as gathering facilities. In three separate orders, FERC granted in part and denied in part the relief sought. Pet. App. 60a-97a, 127a-167a, 198a-234a.

FERC reclassified the North Padre and Central Texas subsystems, and the portion of the North High subsystem existing upstream of the central aggregation point, as gathering, while continuing to classify the facilities downstream of those points as transportation. Pet. App. 89a, 157a. As to the Central Louisiana subsystem, FERC reclassified the laterals that were located upstream of Vermillion Block 67, and those that intersected with the looped trunklines, as gathering, while continuing to classify the trunklines as transportation. *Id.* at 226a. FERC allowed Transco to spin down all of the subsystems (*id.* at 92a, 164a, 230a), but retained rate jurisdiction over those subsystems that it

had declined to reclassify as gathering. *Id.* at 89a-90a, 227a.

The reclassified facilities exhibit the following physical characteristics: extension into production areas for collection of large volumes of gas from numerous wells; lengths and diameters that are dictated by the production areas' distance from shore and output of gas; operating pressures derived from well pressure rather than compression; and, in the case of three of the subsystems, convergence into central aggregation points from which trunklines carry the gas onshore. Pet. App. 87a-89a, 157a-161a, 225a-227a.

Regarding the request for abandonment, FERC stated that "[s]ince the facilities proposed to be abandoned were certificated to transport natural gas in interstate commerce * * *, the abandonment of Transco's certificated interests in the OCS facilities requires Commission authorization under NGA section 7(b)." Pet. App. 68a, 137a, 205a. FERC then specifically found that, based on a variety of factors, "the public convenience and necessity" permit the requested abandonment and transfer. *Id.* at 69a, 137a, 206a. FERC also stated its opinion that "section 1(b) of the NGA exempts gathering from the jurisdiction of this Commission. Thus, if the primary function of facilities for which abandonment is sought is found to be gathering, the Commission has no discretion to withhold such authorization." *Id.* at 75a, 143a, 212a. FERC denied rehearing, "reaffirm[ing] [its] conclusion that the abandonment is required and in the public interest." *Id.* at 104a, 174a, 241a.[4]

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[4] Prior to the court of appeals' decision, FERC exercised its "in-connection-with" rate authority under 15 U.S.C. 717c(a), 717d(a) to order Transco to file a just and reasonable gathering

Petitioners subsequently challenged FERC's reclassifications, and Transco challenged FERC's refusal to reclassify all of its subsystems as engaged in gathering.

4. The court of appeals affirmed. Pet. App. 1a-20a. The court observed that affirmance of FERC's gathering classifications was "instructed by [*ExxonMobil*, 297 F.3d at 1084], where the court stated that it will defer to FERC's reasonable determinations regarding gathering status under * * * 15 U.S.C. § 717(b)." Pet. App. 2a. The court held that in this case "FERC considered the appropriate factors under the primary function test and sufficiently explained its reasoning." *Id.* at 3a. The court concluded that none of the petitioners had demonstrated that FERC's demarcations between gathering and transportation were outside "a zone of reasonableness," *id.* at 2a (quoting *ExxonMobil*, 297 F.3d at 1084), and that FERC had properly applied the modified primary function test that the court had upheld in *ExxonMobil*. *Id.* at 16a-17a. The court explained that "FERC gave reasoned consideration to each of the pertinent factors, and its factual conclusions are supported by substantial evidence in the record." *Id.* at 17a.

The court of appeals also rejected petitioners' contention that FERC improperly granted the abandonment requests under 15 U.S.C. 717f(b). The court held that "once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility." Pet. App. 19a. The court of appeals also found that, "even though

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rate for the North Padre subsystem, after finding that Transco and its affiliate had acted in concert to frustrate FERC's regulation. *Shell Offshore*, 103 F.E.R.C. at 61,661.

[FERC] lacked the authority to deny abandonment," FERC reasonably concluded that petitioners' public interest concerns "were unfounded." *Ibid.*

ARGUMENT

Petitioners renew their challenges to FERC's orders, contending that the Transco's entire system is engaged in jurisdictional transportation and that, assuming the reclassifications were proper, FERC was required by Section 7(b) of the NGA to find that the transfers of those facilities to Transco's affiliates were in the public interest. Neither of those contentions warrants this Court's review.

1. On August 14, 2003, FERC issued a public notice stating that on September 23, 2003, FERC would convene a public conference "to explore whether the Commission should reformulate its test for defining nonjurisdictional gathering in the shallow waters of the Outer Continental Shelf and if so what the new test should be." Supp. Br. for the FERC App. at 1a-12a, *Producer Coalition* v. *FERC*, cert. denied, 124 S. Ct. 47 and 48 (2003) (Nos. 02-1215 and 02-1265) (*Notice of Public Conference, Application of the Primary Function Test for Gathering on the Outer Continental Shelf*, Docket No. AD03-13-000 (Aug. 14, 2003)). The Commission stated that its objective in issuing the notice was to develop a "clear, consistent approach to offshore gathering * * * to protect producers and customers from the market power of third party transporters and to avoid different jurisdictional outcomes for companies that perform essentially the same economic function." *Id.* at 2a. FERC concluded that it would convene the public conference "to hear suggestions from interested persons on developing a new test for gathering on the OCS that is reasonably objective and that furthers the

regulatory goals of the Natural Gas Act." *Id.* at 10a. FERC also solicited comments on whether, "[i]f formerly certificated facilities are determined to be gathering, may the Commission nonetheless require the company to file for abandonment under [15 U.S.C. 717f(b)] before the facilities may be transferred to another company." *Id.* at 11a. The conference was held on September 23, 2003, at which petitioners submitted both written and oral comments. FERC is currently evaluating those and other comments, as well as continuing to receive comments from interested persons.

This Court should not address the legal, factual, and policy issues raised by the certiorari petitions before FERC has had the opportunity to receive public comment upon and consider (1) whether FERC should reformulate its test for determining nonjurisdictional gathering in the shallow waters of the OCS, and if so, what the relevant test and criteria should be, and (2) whether FERC should conduct abandonment proceedings for those formerly certificated facilities determined to be engaged in gathering. As FERC concluded, relevant to those questions are policy issues concerning the potential for "inconsistent classification and regulatory treatment" of similarly situated competitors as well as the impact on "customers who may have made investments relying on the regulated status of a transporter." Supp. Br. for the FERC App. at 10a, *Producer Coalition, supra* (Nos. 02-1215 and 02-1265).

Those and other policy issues, including the ones raised by petitioners (03-431 Pet. 27-29) are best directed in the first instance by FERC, which may reformulate its jurisdictional test for determining whether facilities operating in the shallow waters of the OCS are engaged in jurisdictional transportation or

nonjurisdictional gathering. Any new test would govern future requests to reclassify or abandon previously certificated transmission facilities. Moreover, should FERC adopt a new test, petitioners or Transco would be free to petition the FERC to reclassify some or all of Transco's facilities under 15 U.S.C. 717c, 717d, and 717f. Finally, because any review of the substance and application of the Commission's test would be subject to review under *Chevron*, this Court should decline review of the court of appeals' decision in view of FERC's Notice concerning the possible reformulation of its test.

2. Petitioners' highly technical and fact-bound challenge to FERC's reclassification determination also does not warrant this Court's review. In reclassifying some, but not all, of Transco's offshore system as gathering facilities, FERC rejected petitioners' position that *all* of the subject subsystems engage entirely in transportation, as well as Transco's contention that the entire North High Island, Central Louisiana and West Cameron subsystems engage in gathering. Correctly applying a deferential standard of review, the court of appeals held that FERC had reasonably reclassified portions of the subsystems based on its consideration of the particular physical factors in each case. For the reasons explained in our brief in opposition to the petitions for a writ of certiorari in No. 02-1215 (*Producer Coalition* v. *FERC*, 124 S. Ct. 47 (2003)) and No. 02-1265 (*ExxonMobil Gas Mktg.* v. *FERC*, 124 S. Ct. 48 (2003)), FERC's orders and the court of appeals' decisions in this case and *ExxonMobil* are entirely consistent with this Court's decision in *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84 (1963). Indeed, we are aware of no court decision (and petitioners cite to none) that supports

petitioners' novel view (03-431 Pet. 15-22; 03-147 Pet. 6) that any movement of gas in a pipeline operating in the OCS beyond the platform constitutes transportation. Quite to the contrary, those courts to have considered petitioners' contention have rejected it. *ExxonMobil*, 297 F.3d at 1085-1086; *Sea-Robin*, 127 F.3d at 369-371; *EP Operating*, 876 F.2d at 48-49.[5]

As the court of appeals properly found (Pet. App. 14a-17a), FERC's orders exhaustively reviewed the relevant physical criteria and specifically found that some (but not all) of Transco's systems were engaged in gathering. Petitioner's fact-bound contentions to the contrary merit no further review.[6]

3. a. The Shell Offshore petitioners, but not petitioner Producer Coalition, also argue (03-431 Pet. 25-27) that the court of appeals improperly permitted FERC to grant the abandonment of portions of Transco's facilities without finding the abandonment to be in the

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[5] Indeed, FERC's jurisdictional line-drawing is applied *more* favorably to producers offshore than onshore. In the offshore context, the gas does not enter the processing plant—where it attains pipeline quality—until it reaches shore. Pet. App. 64a, 131a, 201a. FERC nonetheless has determined that Transco's offshore gathering ends well upstream of the processing plant. *Id.* at 89a, 159a-160a, 226a.

[6] The Shell Offshore petitioners incorrectly suggest (03-431 Pet. 24) that FERC may classify a facility as engaged in gathering only if a State could regulate the activity under the Commerce Clause. Of course, the pipelines at issue here are offshore, and so acceptance of petitioners' contention presumably would mean that FERC lacks the authority to reclassify any pipeline even if it is unquestionably engaged in gathering functions. In any event, this Court has stated that Congress in the NGA "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power." *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

public interest under 15 U.S.C. 717f(b). That contention lacks merit.

The NGA bars any natural gas company from "abandon[ing] all or any portion of its facilities *subject to the jurisdiction of the Commission*, or any service rendered by means of such facilities," without a finding that the gas is depleted "or that the present or future public convenience or necessity permit the abandonment." 15 U.S.C. 717f(b) (emphasis added). By its plain terms, the abandonment provision "covers only 'facilities subject to the jurisdiction of the Commission'" and cannot be used to expand FERC's authority "over the production and gathering of gas." *FPC* v. *Panhandle E. Pipe Line Co.*, 337 U.S. 498, 509 (1949) (quoting 15 U.S.C. 717f(b)). The court of appeals correctly held that "once FERC determines that a facility is not dedicated to a jurisdictional function, it has no authority to exercise jurisdiction over that facility by denying the certificate of abandonment for that facility." Pet. App. 19a.

In any event, this case would be an inappropriate vehicle in which to consider petitioners' contentions to the contrary because FERC granted the precise relief petitioners seek, *i.e.* a determination whether Transco's transfers would be in the public interest. As a result, although FERC expressed the view that the Commission lacked the discretion to deny abandonment of non-jurisdictional facilities, Pet. App. 75a, 143a, 212a, FERC also unquestionably found that "the public convenience and necessity" permitted Transco's requested abandonment and transfer to its affiliate. *Id.* at 69a, 137a, 206a.

Specifically, FERC observed that Transco had responded to FERC's unbundling policies in Order No. 636 by replacing its bundled services with "an array of

unbundled services, such as transportation, storage, and fully unbundled sales services, to a wide variety of customers." Pet. App. 68a-69a, 137a, 206a. Thus, "Transco no longer require[d] its extensive gathering facilities to provide [bundled] gas sales." *Id.* at 69a, 137a, 206a. FERC concluded that the proposed spin-down would permit "Transco to eliminate unnecessary expenses associated with these [reclassified] facilities" and Williams to "make efficient use of the acquired facilities to provide open access gathering service." *Id.* at 137a; see also *id.* at 69a, 206a. FERC also concluded that the transfer "is consistent with the unbundling policies of Order No. 636 and should, in the long run, promote competition within the gathering industry." *Id.* at 75a, 143a, 212a.

Significantly, FERC further explained that on approval of the spin-downs, the gathering facilities would be subject to the OCSLA, which would prevent Williams "from discriminating against any shipper that seeks access to the facilities." Pet. App. 76a, 144a, 213a. FERC also explained that Williams had represented to FERC that it would negotiate new agreements "with all shippers that should not result in degraded service." *Id.* at 76a, 144a. Finally, FERC pointed out that FERC's regulatory authority over Transco's tariffs would provide further protection. *Id.* at 77a, 145a.

On rehearing, FERC reiterated its conclusion that the transfers were in the public interest, rejecting petitioners' concerns that Williams would "be able to take advantage of its existing control of the [gathering] market in order to exact monopoly rents from shippers." Pet. App. 104a, 174a, 241a. FERC reaffirmed its findings that its unbundling policies "should, in the long run, promote competition"; that OCSLA would prevent Williams "from discriminating against any shipper"

seeking access to Williams' facilities; and that "Transco's existing tariff standards" would prevent the pipeline "from acting in a discriminatory manner." *Id.* 104a-105a, 174a, 241a. FERC also observed that Williams "has agreed to continue to serve Transco's existing customers following the facilities' transfer," thereby "avoid[ing] any abrupt disruption to Transco's customers' expectations." *Id.* at 104a-105a, 174a-175a, 241a-242a.

The court of appeals found those conclusions reasonable, explaining that "FERC has taken the long view, concluding that Order No. 636's unbundling policies create competitive conditions and that, combined with the standards of conduct for gathering facilities in Transco's tariff, the OCSLA sufficiently guards against the exercise of monopoly power." Pet. App. 19a. Significantly, petitioners do not challenge FERC's extensive factual findings or the court of appeals' affirmance of FERC's conclusions. There is accordingly no basis for this Court to grant plenary review simply to determine whether FERC was required to make the public interest determination that FERC in fact has already made.

b. Petitioners also argue (03-431 Pet. 25-27) that the court of appeals' conclusion that no public interest finding was necessary conflicts with the Fifth Circuit's decision in *Pacific Gas & Electric Co.* v. *FERC*, 106 F.3d 1190, cert. denied, 522 U.S. 811 (1997). As discussed above, however, resolution of that purported conflict would not aid petitioners, since FERC has already concluded that the transfers at issue in this case further the public interest. In any event, the court of appeals' decision does not squarely conflict with *Pacific Gas*, which did not even involve reclassified facilities. Rather, the Fifth Circuit in *Pacific Gas*

rejected FERC's assertion in that case that FERC lacked "the power to examine whether abandonment would be in the public interest when a pipeline is abandoning its gathering facilities *to a nonjurisdictional entity*." 106 F.3d at 1197 (emphasis added). The court reached the unremarkable conclusion that the jurisdictional status of the *transferee* is irrelevant, explaining that "it makes no difference who gets the facilities or, indeed, whether anyone gets them at all." *Ibid.*

Pacific Gas thus did not address the precise question addressed by the court of appeals in this case, *i.e.*, whether FERC must make a public interest finding when it reclassifies a facility as no longer engaged in jurisdictional services. Indeed, the court of appeals below apparently recognized the absence of a square conflict when it stated that "[w]e part company with [*Pacific Gas*] *to the extent it holds* that FERC has discretion to examine whether abandonment would be in the public interest." Pet. App. 19a (emphasis added).

Furthermore, as explained above (see pp. 10-12, *supra*), in its recent notice seeking public comment on various issues concerning the classification and reclassification of facilities on the OCS, FERC specifically solicited comments on whether it may require a company to file an application for abandonment under 15 U.S.C. 717f(b) before facilities that have been found to be nonjurisdictional gathering facilities are transferred to another company. As with the first question presented in the case concerning FERC's approach to distinguishing between gathering and transportation on the OCS, FERC should be give the opportunity to address the abandonment issue in the first instance before review by this Court. For this additional reason, review of the abandonment issue is not warranted in

this case even if the issue were otherwise appropriate for review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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